Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Petitioner in No. 83-1325

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QUESTION PRESENTED

Whether airline captains who are subject to a bona fide occupational qualification (BFOQ) under § 4(f)(1) of the Age Discrimination in Employment Act may be retired, where the plain meaning and legislative history of § 4(f)(1) authorize mandatory retirement at an age which is a BFOQ.

PARTIES

Air Line Pilots Association, International, Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C. A. Parkhill and the Equal Employment Opportunity Commission are parties to the decision sought to be reviewed here. In addition Nicholas Vasilaros, *et al.*, were intervenors in a consolidated case in the court below, as to which review by this Court has not been sought.

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PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA"), petitioner in No. 83-1325 and respondent in No. 83-997, respectfully submits this brief on the merits as petitioner in No. 83-1325.[1]

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[1] Cases No. 83-997 and No. 83-1325 were consolidated pursuant to an order of this Court entered on April 2, 1984 (52 U.S.L.W. 3720).

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the appendix to the petition for certiorari of Trans World Airlines, Inc. ("TWA") in No. 83-997 beginning at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F.Supp. 1221 and appears in the same appendix beginning at page A-44.

JURISDICTION

This Court's jurisdiction exists by virtue of 28 U.S.C. § 1254(1). TWA petitioned this Court for a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Second Circuit. ALPA subsequently filed a conditional cross-petition. Both petitions were filed within 90 days of the denial of rehearing by the Court of Appeals. TWA's petition was granted on February 27, 1984 (52 U.S.L.W. 3631), and ALPA's petition was granted on April 2, 1984 (52 U.S.L.W. 3720).

STATUTES AND REGULATION INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(a), provides:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

> (3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 4(c)(3) of the ADEA, 29 U.S.C. § 623(c)(3), provides:

> It shall be unlawful for a labor organization—
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 4(f) of the ADEA, 29 U.S.C. § 623(f), provides:

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631 of this title because of the age of such individual; or
>
> (3) to discharge or otherwise discipline an individual for good cause.

Section 12(a) of the ADEA, 29 U.S.C. § 631(a), provides:

(a) The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations, 14 C.F.R. § 121.383(c), provides:

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

A. TWA's Employment of Flight Deck Crew Members

ALPA is the authorized bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.*, for the approximately 3,000 flight deck crew members employed by TWA, A-4—A-6,[2] who serve in the positions of captain, first officer, international relief officer ("IRO") (on a few overseas routes) and flight engineer. J.A. 339. The terms and conditions of employment of crew members are governed by collective bargaining agreements ("Working Agreements") between TWA and ALPA. A-8.

Seniority is based on length of service as a crew member and governs the allocation of work assignments as well as transfers from one position to another. J.A. 294, 302-314. Flight engineer is the entry position for TWA flight deck employment, although certain "career" flight engineers hired prior to 1962 have priority rights to

[2] References to "A- " are to the decision of the Second Circuit Court of Appeals which appears in the Appendix to TWA's petition for certiorari filed December 16, 1983. References to "J.A." are to the Joint Appendix filed in the Second Circuit pursuant to permission of this Court by order dated March 19, 1984 (52 U.S.L.W. 3687); all parties have agreed to cite to the Joint Appendix below.

flight engineer positions. J.A. 210-214. In accordance with the seniority system embodied in the Working Agreement, a captain may bid for vacancies in the flight engineer position, J.A. 305; in specified circumstances he may also displace a less senior incumbent flight engineer, J.A. 311. Seniority rights are extinguished when a crew member's services are terminated, whether by discharge, resignation or retirement. J.A. 294.

The Federal Aviation Administration ("FAA") prohibits flight deck crew members from serving as "pilots" (captains) and "co-pilots" (first officers) once they reach age 60. 14 C.F.R. § 121.383(c) ("Age 60 Rule"). *See generally Rombough* v. *FAA*, 594 F.2d 893 (2d Cir. 1979). The FAA does not set a maximum age limit for flight engineers. A-7. It is undisputed in this action that an age less than 60 is a bona fide occupational qualification ("BFOQ") for TWA captains and first officers under § 4(f)(1) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(1). A-7—A-8.

B. TWA's Retirement Practices

From the issuance of the FAA Age 60 Rule in 1959 to August, 1978, TWA retired all flight deck crew members (including flight engineers) at age 60, as allowed by § 4.2 of the collectively bargained retirement plan (which requires crew members to retire at their normal retirement dates [age 60], "unless written approval of the company is granted for continuance in employment"). J.A. 243, 410.

The 1978 amendments to the ADEA, effective April 6, 1978, eliminated a bona fide employee benefit plan defense to mandatory retirement at age 60. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978). In August, 1978, TWA decided to permit flight engineers to continue in their jobs past age 60, but did not change its policy of retiring captains and first officers when they were sub-

ject to the FAA Age 60 Rule. J.A. 425. TWA applied its policy change retroactively by re-employing any flight engineer who had reached age 60 on or after April 6, 1978. A-9.

C. Procedural History

TWA's policy was challenged in two lawsuits. In *Thurston* v. *TWA*, three TWA captains who requested to serve as flight engineers after their 60th birthdays but were retired at age 60, brought an action against TWA and ALPA for violation of the ADEA; intervenor EEOC represents an additional 7 former captains who were also involuntarily retired after April 6, 1978.[3] A-10 n.10. *Thurston* was consolidated with *ALPA* v. *TWA*, an action challenging the August, 1978, policy permitting service of flight engineers beyond age 60 as a unilateral change in working conditions contrary to § 2, Seventh and § 6 of the RLA, 45 U.S.C. § 152, Seventh and § 156.

The district court entered summary judgment against individual plaintiffs and the EEOC in *Thurston* v. *TWA*, and entered summary judgment in favor of TWA in *ALPA* v. *TWA*.

The Court of Appeals reversed the judgment in *Thurston*, and entered summary judgment in favor of plaintiffs. With respect to "[t]he employment practice at issue in this lawsuit—the severing of age 60 captains from the company," the court held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants

[3] Three of these 10 captains reached age 60 prior to August 1978; four of the captains reached age 60 between August and November, 1978. One reached age 60 in 1979; one reached age 60 in 1980; one reached age 60 in 1981. *See* TWA Brief at 13 n.16.

must prevail on their ADEA claims." A-26, 31. The court further held that ALPA violated § 4(c)(3) of the ADEA, 29 U.S.C. § 623(c)(3). The court rejected ALPA's argument that § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), authorized TWA to retire captains and first officers at an age which is a BFOQ.[4] The Court of Appeals affirmed the judgment in *ALPA* v. *TWA*; ALPA has not sought review of that decision.

SUMMARY OF ARGUMENT

TWA correctly asserts that its August, 1978, policy does not discriminate on the basis of age, and that the district court therefore properly entered summary judgment in favor of defendants. TWA Brief at 16-29. ALPA agrees that TWA's policy complies with § 4(a) of the ADEA, and further submits that § 4(f)(1) of the ADEA authorizes an employer "to take any action otherwise prohibited under [§ 4(a)] . . . where age is a [BFOQ] . . . ." An age less than 60 is a BFOQ for TWA captains. "[A]ny action otherwise prohibited" includes mandatory retirement. Accordingly, TWA lawfully retired the individual plaintiffs and EEOC claimants, who were employed as captains when they turned 60.

The Second Circuit ruled that "involuntary retirement" at an age which is a BFOQ is lawful in some circumstances but not in others, A-30, depending on the employer's treatment of employees who are unable to continue to work in a particular job for "non-age reasons." A-31. However, the legislative history of the ADEA demonstrates that Congress intended to authorize the "retirement" of employees at an age which is a BFOQ, and offers no support for a distinction between

[4] The Court of Appeals also ruled that ALPA was not responsible to plaintiffs for monetary damages as a matter of law. A-38. This Court has granted TWA's petition for certiorari (opposed by plaintiffs) on this issue in 83-997. ALPA will brief this issue as respondent in No. 83-997.

permissible and impermissible use of mandatory retirement based on policies applicable to employees in other circumstances. In the light of the plain meaning of the statutory language and the legislative history explicitly approving mandatory "retirement" at an age which is a BFOQ, § 4(f)(1) should be read to authorize TWA's involuntary retirement of captains at age 60.

ARGUMENT

SECTION 4(f)(1) OF THE ADEA AUTHORIZED TWA TO CONTINUE ITS POLICY OF RETIRING PILOTS WHO WERE SUBJECT TO AN AGE-BASED BONA FIDE OCCUPATIONAL QUALIFICATION.

A. In 1978, Congress Restricted the Permissible Range of Mandatory Retirement Practices, But Continued to Authorize Mandatory Retirement at an Age Which Is a BFOQ.

Section 4(a) of the ADEA prohibits an employer from discharging an individual because of age and § 4(c)(3) makes it unlawful for a labor organization to cause or attempt to cause an employer to discriminate in violation of § 4. 29 U.S.C. §§ 623(a), 623(c)(3). Section 4(f) of the ADEA defines the scope of authorized employment practices. Section 4(f)(3) specifies that an employer may "discharge" or "discipline an individual for good cause." 29 U.S.C. § 623(f)(3). As enacted in 1967, § 4(f)(2) specified that it shall not be unlawful "to observe the terms" of a bona fide seniority system or employee benefit plan. Pub. L. No. 90-202, § 4(f)(2), 81 Stat. 602, 603. Section 4(f)(1) was written in broader terms: it provided that "[i]t shall not be unlawful for an employer . . . or labor organization to take any action otherwise prohibited . . . [under §§ 4(a), (b), (c), or (e)] where age is a [BFOQ] or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The only express restriction on the scope of

the far-reaching language of § 4(f)(1) is that it does not apply to actions prohibited by § 4(d) of the ADEA, 29 U.S.C. § 623(d) (which bars discrimination based on opposition to unlawful practices or participation in the investigation of unlawful practices).

In the 1978 ADEA amendments, Congress prohibited mandatory retirement practices justified solely by a seniority system or employee benefit plan, by modifying § 4(f)(2) to state that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual."[5] 29 U.S.C. § 623(f)(2). At the same time, Congress decided to continue *unchanged* the authorization "to take any action otherwise prohibited . . . where age is a [BFOQ]." Significantly, Congress did not amend § 4(f)(1) to add a restriction on mandatory retirement similar to the proviso added to § 4(f)(2).

In clarifying the 1978 amendments to § 4(f)(2), Congress emphasized that employers could continue to retire employees subject to a BFOQ. The Senate adopted an amendment to § 4(f)(1) providing that an employer or labor organization "may take any action otherwise prohibited [by the ADEA] . . . *including the establishment of a mandatory retirement age less than [age 70]* . . . where age is a [BFOQ].[6] In Conference Committee, the

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[5] Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978). In 1978, Congress also extended the coverage of the Act to age 70, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (1978), and added exemptions for "compulsory retirement" of certain persons after age 65 who are in an "executive or high policy-making position." *Id.* Congress also added an exemption for "compulsory retirement" of any person after age 65 "who is serving under a contract of unlimited tenure . . . at an institution of higher education. . . ." *Id.*, 92 Stat. 190. Section 3(b)(3) of the 1978 ADEA amendments repealed the latter provision as of July 1, 1982. Pub. L. No. 95-256, § 3(b), 92 Stat. 190.

[6] S. Rep. No. 493, 95th Cong., 1st Sess. 11, 24 (1977) (hereinafter "S. Rep."), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 504, 514 (proposed amendments in italics).

Senate conferees withdrew the amendment because "the conferees agreed that the amendment *neither added to nor worked any change upon present law.*"[7] *See* A-27.

The House Committee Report expressed an intent both to *permit* "mandatory retirement or other employment practices" where age is a BFOQ, and *not* to require the use of alternative procedures to mandatory retirement:

> While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-Federal employees aged 40-69, and to prohibit unreasonable mandatory retirement with respect to Federal employment, *it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to the normal operation of a particular activity such as provided for in the current law in section 15(b) and 4(f)(1).* It is recognized that certain mental and physical capacities may decline with age, and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers.
>
> * * *
>
> This legislation does not require employers to provide special working conditions for older workers to allow them to remain or become employed. *While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation.*

H.R. Rep. No. 527 (Pt. 1), 95th Cong., 1st Sess. 12 (1977) (hereinafter "H.R. Rep.") (emphasis added).

Moreover, the floor debates in the House and Senate confirm that Congress fully intended to exempt employees subject to a BFOQ from the Act's prohibitions against mandatory retirement. Rep. Weiss, one of the authors of the 1978 amendments, stated:

> Currently, there are three exceptions to the act. First, Section 4(f)(1) *exempts workers in hazardous occupations from the protections of the act.* Second, section 4(f)(3) states that a worker, although covered by the act, can be discharged for good cause. No one can dispute the intent of these two exceptions.

123 Cong. Rec. 30,566 (1977) (emphasis added).[8] Senator Williams, a floor manager of the 1978 amendments in the Senate and the author of the Senate's proposed amendment to § 4(f)(1), explained that his amendment would confirm that once a BFOQ had been established, "an employer may lawfully require mandatory retirement at that specified age." 123 Cong. Rec. 34,296 (1977).[9]

Congress' understanding of the term "retirement" is not open to doubt. As a matter of its ordinary meaning and usage,[10] "retirement" refers to the complete termination of the employment relationship. It is "commonly ac-

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[7] H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 528, 529 (emphasis added).

[8] Following the Conference Committee's consideration of the amendments, Rep. Weiss reiterated that: "Section 4(f)(1) of the ADEA exempts situations in which age is a bona fide occupational exception [sic] . . . there is universal acceptance of [this] provision." 124 Cong. Rec. 7886-7887 (1978).

[9] *See also* 123 Cong. Rec. 34,297, 34,318-319 (1977) (remarks of Sen. Javits).

[10] *See Perrin* v. *United States*, 444 U.S. 37, 42 (1979) (words that Congress has used are to be given their "ordinary, contemporary, common meaning" unless otherwise defined); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) (where Congress uses terms that have accumulated a "settled" meaning, it must be assumed that Congress intended to incorporate that meaning).

cepted . . . in industrial relations" [11] that "retirement" encompasses the elimination of all employment rights. An employee who retires from his job on November 30, 1984, would not expect to report to work for assignment to another position in the same company on December 1, 1984. This Court has held that retired employees cannot be members of a bargaining unit certified by the National Labor Relations Board precisely because retirement, in contrast to lay-off or leave, involves the termination of any expectation of future employment. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165-66, 168 (1971).[12]

That retirement refers to termination from employment was also recognized in the Report of the Secretary of Labor, *The Older American Workers: Age Discrimination in Employment* (1965) ("Report"), which played a significant role in "the process of fact-finding and deliberation" leading to enactment of the ADEA. *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054, 1058 (1983). As part of its discussion of the effects of seniority systems on the hiring of older workers, the Report found that retirement results in the termination of seniority rights: "Although *retirement*, particularly early retirement, creates other types of problems, *it brings to an end those of seniority protection and related on the job claims.*" Report at 57-58 (emphasis added). The Report likewise informed Congress of the distinction between mandatory retirement policies, and alternative employment practices allowing transfer to less demanding positions. Report at 76, 88-89. This was the very distinction drawn by the 1977 House Committee Report, *supra*, p. 10, when it made clear that transfers were *not* required by the ADEA as an alternative to lawful mandatory retirement pursuant to 29 U.S.C. § 623(f)(1) or § 631(c).

"Retirement" is used in the 1978 amendments and throughout the legislative history to describe both what is to be prohibited [13] and what is to be permitted,[14] but its meaning does not change from one context to the other. The House Committee Report analyzed existing retirement practices in terms that unambiguously equated mandatory retirement with the termination of employment. H.R. Rep. at 2, 9-11. The Senate Committee Report, in relation to amending § 4(f)(2), likewise recognized that "*forced retirement extinguishes an individual's right to employment. . . .*" S. Rep. at 10, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS, 504, 513 (emphasis added). The references in the Senate amendment and the Com-

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[11] *California Brewers Association* v. *Bryant*, 444 U.S. 598, 605 (1980). "Title VII does not define the term seniority system, and no comprehensive definition of the phrase emerges from the legislative history of § 703(h). . . . It is appropriate, therefore, to begin with commonly accepted notions about 'seniority' in industrial relations, and to consider those concepts in the context of Title VII and this country's labor policy." 444 U.S. at 605. Indeed, the meaning of "mandatory retirement" is far more precise than "seniority," which applies to a vast range of employment practices used to take length of service into account in making employment decisions. *See generally* Aaron, *Reflections on the Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532 (1962).

[12] *Accord United Mine Workers of America Health and Retirement Funds* v. *Robinson*, 455 U.S. 562, 574-75 (1982). *See also Inland Steel Co.* v. *NLRB*, 170 F.2d 247, 251-52 (7th Cir. 1948), *cert. denied in relevant part*, 336 U.S. 960 (1949), *otherwise aff'd*, 339 U.S. 382 (1950) (compulsory retirement practices are a mandatory subject of bargaining in part because they result in elimination of seniority rights embodied in collective bargaining agreement). *See generally Roberts* v. *Lehigh & New England Railroad*, 323 F.2d 219, 221 (3d Cir. 1963) (union's negotiation of mandatory retirement provision eliminating accrued seniority rights did not violate the Railway Labor Act); *McMullans* v. *Kansas, Oklahoma and Gulf Railroad*, 229 F.2d 50, 53-55 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956); *Goodin* v. *Clinchfield Railroad*, 125 F.Supp. 441, 448 (E.D. Tenn. 1954), *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956).

[13] *See* Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978); 29 U.S.C. § 623(f)(2), § 631(a).

[14] *See* Pub. L. No. 95-256, § 3(a), 92 Stat. 189-190 (1978); 29 U.S.C. § 631(c). The exemption for tenured faculty was repealed as of July 1, 1982, Pub. L. No. 95-256, § 3(b)(3), 92 Stat. 190 (1978).

mittee Reports, *supra*, pp. 9, 10, 13, to "mandatory retirement" as authorized by § 4(f)(1) have the same meaning that "retirement" has in these discussions concerning reasons for eliminating mandatory retirement in the context of amending § 4(f)(2).

The legislative history of the ADEA offers no support for the position expressed by the court below that Congress permitted mandatory retirement from a job subject to a BFOQ only where younger employees are terminated whenever they could no longer work in a particular job. *See* A-31. There are various situations in which an employee can no longer work in a particular position (temporary or permanent disability, inadequate performance, changed job requirements, temporary reduction in the workforce, permanent elimination of jobs), and a wide range of possible responses to each of these situations (paid or unpaid leave, layoff, lateral transfer, displacement of other employees, waiting lists, redesign of job requirements, priority rights to available or future vacancies, retraining, termination, part-time work). The position expressed by plaintiffs invites this Court to speculate that Congress was unaware of any of these employment practices or that, if it was aware, it simply neglected to make the distinction adopted by the court below. However, Congress enacted and discussed § 4(f)(1) in broad terms applicable across the entire spectrum of employers subject to the ADEA.

As demonstrated in the amendment to § 4(f)(2), Congress in 1978 was concerned with, and knew how to prohibit, the practice of mandatory retirement pursuant to employee benefit plans. With equal ease, Congress, had it chosen, could have prohibited reliance on a BFOQ to require retirement under § 4(f)(1). Congress could also have amended § 4(f)(1) to preclude mandatory retirement under a BFOQ where transfers or other accommodations have been made available to other employees. Rather, Congress expressed its approval of mandatory

"retirement" at an age which is a BFOQ, and made it clear that alternative policies were not required by the ADEA.

B. The Plain Meaning of § 4(f)(1), as Buttressed by the Legislative History of the ADEA, Authorizes the Mandatory Retirement of Pilots Disqualified by the FAA Age 60 Rule.

In matters of statutory construction, "it is appropriate to begin with the language of the statute itself." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 91 (1981). It is equally appropriate "to begin with the language of the statute" in construing statutory limitations to remedial legislation. *See Kosak* v. *United States*, —— U.S. ——, 104 S.Ct. 1519, 1523-1524 (1984); *INS* v. *Phinpathya*, —— U.S. ——, 104 S.Ct. 584, 589 (1984); *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982).

> This Court has noted on numerous occasions that "in all cases involving statutory construction, 'our starting point must be the language employed by Congress,' . . . and we assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'"

INS v. *Phinpathya*, 104 S.Ct. at 589, *quoting American Tobacco Co.* v. *Patterson*, 456 U.S. at 68.

The language in § 4(f)(1), "to take any action otherwise prohibited . . . where age is a BFOQ," plainly encompasses the "action" of retiring an employee disqualified by an age-based BFOQ. *Cf. United States* v. *Rodgers*, —— U.S. ——, 52 U.S.L.W. 4510, 4511 (U.S. May 1, 1984) (prohibition of false statements with respect to "any matter" is "sweeping language"). Indeed, even the EEOC has acknowledged that "[i]f age is a 'bona fide occupational qualification,' [an employer] is free to impose a mandatory retirement age . . . ." [15]

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[15] Brief of Appellant EEOC, at 13-14, *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054 (1984). *See* 103 S.Ct. at 1071 (Burger, C.J., dissenting).

Where the statute is unambiguous, the plain meaning of the statutory language must be applied. *See INS* v. *Phinpathya*, 104 S.Ct. at 589 (remedial provision applicable to an alien "who has been physically present in the United States for a continuous period of not less than seven years" should be literally applied, since "the ordinary meaning of these words does not readily admit of any 'exception[s] . . . .'"); *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 274 (1980) ("Nor are we free to read the subsequent words 'all *other* cases' as though they described 'all of the foregoing' as well; the use of the word 'other' forecloses that reading."). *See also Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 173 (1978). "[T]o take any action otherwise prohibited . . . where age is a [BFOQ]" must be read to authorize mandatory retirement at an age which is a BFOQ, since "[t]he language . . . [of the statute] is clear and admits of but one reasonable interpretation," *Dickman* v. *Commissioner*, —— U.S. ——, 104 S.Ct. 1086, 1089 (1984).

The court below inverted this procedure, and used what it perceived to be the purposes of the ADEA and § 4(f)(1) to define the meaning of the statutory language. A-28 - A-29. This Court requires greater deference to the Congressional choices embodied in statutory language. *See Mohasco Corp.* v. *Silver*, 447 U.S. 807, 813 (1980) (holding that 300 day filing limit under Title VII must be read literally, and rejecting the view of the Second Circuit that "a literal reading did not give sufficient weight to the overriding purpose of the Act."). *See also American Tobacco Co.* v. *Patterson*, 456 U.S. at 68.

The Second Circuit erroneously reasoned that the plain meaning of "take any action otherwise prohibited" is not applicable if it would result in an "expansive reading of

[29 U.S.C.] § 623(f)(1) . . . that would swallow the Act." A-29:

> Under ALPA's interpretation, for example, a company could lawfully provide fewer retirement benefits to captains retiring at age 60 than to other retiring employees, simply because the position of captain is subject to an age 60 BFOQ.

Id. This Court has squarely rejected using extreme hypothetical examples to justify departing from the statutory language where the ordinary meaning of that language applies to the case before the court. *Dickman* v. *Commissioner*, 104 S.Ct. at 1093;[16] *Potomac Electric Power Co.* v. *Director, Office of Workers' Compensation Programs*, 449 U.S. at 284.

Moreover, the court below failed to give the differences between § 4(f)(1) and the other sections of § 4(f) the decisive weight which they deserve. The decision acknowledged that "[29 U.S.C.] § 623(f)(2), unlike [29 U.S.C.] § 623(f)(1), contains an explicit prohibition of involuntary retirement on the basis of age," A-27, but considered

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[16] In *Dickman* v. *Commissioner*, petitioners challenged a construction of gift tax statutes to include interest-free demand loans as taxable gifts on the grounds, *inter alia*, that "[c]arried to its logical extreme . . . [this construction] would elevate to the status of taxable gifts such commonplace transactions as a loan of the proverbial cup of sugar to a neighbor or a loan of lunch money to a colleague." 104 S.Ct. at 1093. The Court found this "'parade of horribles'" to be unconvincing for two reasons, both of which apply to the Second Circuit's hypothetical. First, "[w]hen the government levies a gift tax on routine neighborly or familial gifts, there will be time enough to deal with such a case." *Id.* Second, the Court found that other statutory provisions would make the occurrence of these events extraordinarily unlikely. *Id.* As the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1053(a), provides that "an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age," it is equally unlikely that captains retiring at age 60 would be subject to age-based reductions in accrued pension benefits.

the absence of any limiting proviso in § 4(f)(1) to be unimportant. However, in *INS* v. *Phinpathya*, this Court considered the absence of any express limitation in § 244(a)(1) of the Immigration and Nationality Act to be highly significant where Congress had provided such a limitation in former § 301(b) of the statute.[17] The court below also ignored the differences between the broad language of § 4(f)(1), "to take any action otherwise prohibited," and the language of § 4(f)(2) and § 4(f)(3) exempting specific employment practices. As this Court recently emphasized in *Kosak* v. *United States*, 104 S.Ct. at 1524, the use of general language in a limitation, where other limitations in the statute are stated with greater specificity, demonstrates "[t]he absence of any analogous desire to limit the reach of the [general] statutory exception . . . ."

The "plain language of the Act buttressed by its legislative history" is dispositive of its meaning. *Tennessee Valley Authority* v. *Hill*, 437 U.S. at 187. *See Dickman* v. *Commissioner*, 104 S.Ct. at 1089. *See also Bell* v. *New Jersey and Pennsylvania*, —— U.S. ——, 103 S.Ct. 2187, 2197 (1983). As demonstrated above, the House Committee Report, the Senate Committee Report, the Conference Committee Report, and Congressional debates demonstrate that Congress intended to authorize mandatory "retirement" at an age which is BFOQ. Requiring a captain disqualified by the FAA Age 60 Rule to retire at age 60 is "to take any action otherwise prohibited under [§ 4(a) of the ADEA] . . . where age is a [BFOQ]" within the plain meaning of § 4(f)(1); to engage in "mandatory retirement or other employment practices where age is a [BFOQ] . . ."[18] is within the scope of the activities which Congress expressly identified as exempt in the course of amending the ADEA in 1978.

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[17] "The deliberate omission of a similar moderating provision in [this statute] compels the conclusion that Congress meant this 'continuous physical presence' requirement to be administered as written." *INS* v. *Phinpathya*, 104 S.Ct. at 589.

[18] H.R. Rep. at 12.

Ultimately, the court below simply declined to believe that Congress really meant what it said, and substituted its own judgment concerning the appropriate scope of § 4(f)(1) for the decisions made by Congress in 1978 in authorizing the continued use of certain mandatory retirement practices. The decisions of this Court squarely reject this or any other form of "judicial legislation." *See Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) ("balancing of competing values and interests . . . in our democratic system is the business of elected representatives," not the courts); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 626 (1978) ("[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute.") *See also Heckler* v. *Mathews*, —— U.S. ——, 104 S.Ct. 1387, 1396 (1984); *Tennessee Valley Authority* v. *Hill*, 437 U.S. at 194.

The Second Circuit not only ignored Congress' express intent that § 4(f)(1) should continue to authorize mandatory retirement at an age which is a BFOQ, but also read a limitation into § 4(f)(1) that Congress did not enact: making mandatory retirement of employees subject to a BFOQ unlawful when an employer accommodates other employees who are no longer able to work in a particular job. Yet, there is nothing in the language of § 4(f)(1) or, as demonstrated above, *supra* at pp. 9-13, in the legislative history of the ADEA to justify this distinction. In *American Tobacco Co.* v. *Patterson*, this Court rejected a proposed distinction between the "application" and "adoption" of seniority systems, since "[t]hat distinction would require reading § 703(h) [of Title VII] as though the reference to a seniority system were followed by the words 'adopted prior to the effective date of this section.' But the section contains no such limitations." 456 U.S. at 69. There is similarly no basis to read § 4(f)(1) as if it contained the limitation imposed by the court below on taking "any action" where age is a BFOQ.

Properly construed in accordance with its plain language, as buttressed by the legislative history of the ADEA, § 4(f)(1) authorizes the retirement of airline captains disqualified by the FAA Age 60 Rule at age 60.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be vacated and the judgment of the United States District Court for the Southern District of New York should be reinstated.

Respectfully submitted,

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